PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacIntosh*, 2018 NSPC 23

Date: 2018-07-19
Docket: 8189240
Registry: Pictou

Between:

Her Majesty the Queen

v.

Emily Anne MacIntosh

DECISION REGARDING ADJOURNMENT

Judge:	The Honourable Judge Del W. Atwood
Heard:	2018: 19 July in Pictou, Nova Scotia
Charge:	Para. 334(a), *Criminal Code of Canada*
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Craig Clarke for Emily Anne MacIntosh

By the Court:

[1] Emily Anne MacIntosh is before the court today for the continuation of a sentencing hearing that began 16 June 2018; Ms. MacIntosh elected trial in this court and pleaded guilty to an offence under para. 334(a) of the *Criminal Code*.

[2] Defence counsel seeks to have the court refer Ms. MacIntosh to a restorative-justice program as authorised in (2018) NS Gaz I, 42-50. The program authorisation allows expressly for post-conviction/pre-sentence referrals for cases of this nature, and comprehends the referral being made by the court.

[3] The prosecution opposes a referral, and argues that, as Ms. MacIntosh's conduct involves a substantial breach of trust, a referral to restorative justice would not be in keeping with the goals of the program authorization.

[4] I am adjourning this hearing to 4 September 2018 at 1:30 p.m. I am doing so for two reasons.

[5] First, the court has just received a new community-impact statement which was not before the court on 16 June 2018 when counsel made their initial sentencing submissions; counsel must have time to digest this new material and be given an opportunity to address the court on its contents.

[6] Second, I harbour concerns about the lawfulness of the restorative-justice program authorization, at least to the extent that it confers on the court a jurisdiction to make a post-conviction/pre-sentence referral to restorative justice.

[7] Criminal law is a federal power, conferred under sub-s. 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). This includes necessarily the power to prescribe penalties for breaches of criminal law: see *Constitutional Law of Canada*, 5th ed (Toronto: Thompson Reuters, 2016) at para. 19.8.

[8] The federal government has the authority to delegate this power to the provinces; this is the constitutional permission of legislative inter-delegation: *id.*, at para. 14.3; and see *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392; see also *R. v. W. (D.A.)*, [1988] N.S.J. No. 350 (S.C.T.D.).

[9] Section 717 of the *Code* deals with alternative measures; it falls under Part XXII—Sentencing. Para. 717(1)(a) of the *Code* refers to "measures that are part of a program of alternative measures . . . authorized by a person . . . designated by the lieutenant governor in council of a province". This would appear to delegate to the executive of Nova Scotia the authority to establish an alternative-measures program.

[10] The restorative-justice program authorization published in (2018) NS Gaz I, 42, sets out in its preamble the express declaration that it is "approved by the Attorney General for Nova Scotia as a program of alternative measures pursuant to section 717 of the *Criminal Code* (Canada)".

[11] The restorative-justice program authorization is not a statute; it is subordinate legislation. If there is a conflict between subordinate legislation and the statute that enables it, then it is the statute that must prevail: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at para. 11.56.

[12] Here is the problem.

[13] Ms. MacIntosh has been found guilty by the court of an offence under para. 334(a); the prosecution has presented to the court a statement of facts in accordance with ss. 723-724 of the *Code*. I have found that the facts support the guilty plea. I have received a s. 721 presentence report. I have received s. 722.2 community-impact statements.

[14] At this stage, subsection 720(1) of the *Code* fixes the court with a mandatory jurisdiction to conduct sentencing proceedings and "to determine the appropriate sentence to be imposed."

[15] However, if I were to refer this matter to restorative justice as comprehended in the program authorization, I would be obligated under para. 717(4)(a) of the *Code* to dismiss the charge were I to be satisfied at some point, on a balance of probabilities, "that the person has totally complied with the terms and conditions of the alternative measures."

[16] These provisions are in conflict: one would require that court to impose a sentence; the other, dismiss the charge. The court cannot do both.

[17] The conflict is created by the program authorization. In my view, this places in question the validity of the program authorization—at least to the extent that it allows for post-conviction/pre-sentencing judicial referrals to restorative justice.

[18] Accordingly, I am adjourning this case for the additional reason that I wish to hear from counsel on the validity of the program authorization.

[19] I wish to point out that neither the defence nor the prosecution has challenged the authorization. This is being raised by the court, *sua sponte*.

[20] Counsel have suggested very appropriately that the court ought to hear from the provincial department of justice on this issue. I agree, as it was the minister who signed off on the authorisation. Mr. Gorman has agreed very helpfully to contact counsel for the minister.

[21] Ordered that this matter be adjourned to 4 September 2018 1:30 p.m. Briefs by 24 August 2018.

Ordered accordingly.

JPC